IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 649 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

TAHERALI KADIBHAI

Versus

SAFDARHUSAIN ABDULRAHIM

Appearance:

MR SURESH M SHAH for Petitioners

Mr.Dagli for MR YOGESH S LAKHANI for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 01/09/2000

ORAL JUDGEMENT

1. This is tenant's revision under Section 29(2) of the Bombay Rent Act against concurrent judgment and decrees of the trial Court and the lower Appellate Court.

2. Brief facts are that the revisionist, who was admittedly tenant of the respondent in the disputed premises, filed Suit for declaration and permanent injunction that the landlord - respondent had no right to raise construction in a portion of the tenanted accommodation known as "Deli". The deli is nothing but open land enclosed by boundry wall or some other temporary structure. The landlord purchased the said premises from the previous owner. The landlord intended to raise construction over the deli portion. The tenant revisionist apprehended that the landlord will encroach upon his tenancy right hence he filed Suit for declaration that it be declared that the deli portion is in his tenancy and further sought injunction that the landlord be restrained from raising construction over Deli portion.

3. The landlord respondent contested the Suit on the ground that all the allegations made by the tenant revisionist were incorrect and false and that the deli portion was not in the tenancy of the tenant.

4. The trial Court found that the deli portion was not in the tenancy of the revisionist. Still as a matter of concession, in order to facilitate the tenant to use the tenanted accommodation in a beneficial manner, he was given permission to use 5 ft. wide strip of land from deli portion. According to the tenant revisionist the width of deli portion was about 11 ft. whereas according to the landlord respondent its width was 16 ft.

5. Feeling aggrieved the tenant revisionist preferred Appeal. The Appellate Court found that the deli portion was in use and occupation of the tenant revisionist since inception of tenancy. Relying upon the definition of premise contained in Section 5(8)(b)(i) it found that since deli was used for beneficial enjoyment of the tenanted portion inasmuch there could be no other portion to reach the staircase and the tenanted portion of the disputed accommodation, 5 ft. land from this deli portion was permitted to be used and the landlord was granted permission to raise construction over the remaining portion of the deli land whether it was 11 ft. or 16 ft. wide in all. Feeling aggrieved the tenant has preferred this revision.

6. Learned Counsel for the parties have been heard and the Judgments under challenge have been examined. For all purpose it is a case of concurrent findings recorded by the two courts below. Consequently the scope of interference in this revision is limited.

7. Shri M.S.Shah for the revisionist, however, contended that there is patent error and illegality in the Judgment of the lower Appellate Court inasmuch as it has misread the provisions of Section 13(A) of the Bombay Rent Act and has wrongly held that no application under this section is required to be moved by the landlord. According to him application u/s. 13(A) was necessarily required to be moved by the landlord in case he found that the tenant was not permitting him to raise construction and structures in the nature of additional construction or the structure in the demised portion. He further contended that no issue on this point was framed by the trial Court whether the permission can be granted u/s.13(A) of the Rent Act to the landlord or not and in the absence of issue on the point the matter could not be agitated for the first time in Appeal during argument. If it was so raised for the first time in the course of argument in Appeal, according to Shri Shah, the findings of the trial Court could not be said to be contrary to law by the Appellate Court and that the Judgment of the lower Appellate Court deserves to be set aside.

8. The first question, therefore, which arise for consideration, is whether a seperate application by the landlord u/s.13(A) of the Rent Act was necessary or not. The Appellate Court despite the findings recorded by the trial Court has dismissed the Appeal. A bare reading of Section 13(A) of the Rent Act shows that where the landlord proposes to make any improvement in, or construct any additional structure on, any building which (or part of which) has been let to a tenant, and the tenant refuses to allow the landlord to make the improvement or construct such additional structure, if the Court, on an application made to it in this behalf by the landlord, is satisfied that such work will not cause undue hardship to the tenant (emphasis supplied), the Court may permit the landlord to do such work, and may make such other order as it thinks fit in the circumstances of the case. It is, therefore, clear from plain reading of this section that if the tenant refuses to give permission to the landlord to raise structure or additional structure over the premises let out to him the landlord is duty bound to move an application u/s.13(A) of the Rent Act and if such an application is moved and the Court is satisfied that no undue hardship would be caused to the tenant if the permission prayed for by the landlord is granted it may grant such permission to the landlord. Shri A.M.Dagli, on behalf of Shri Y.S.Lakhani, however, contended that application u/s. 13(A) of the Rent Act is not necessary and he has placed reliance upon

the pronouncement of this Court in Dahyabhai Manchharam v/s. Ratilal, reported in 1980 G.L.R. 557.

9. There are two courses open to the landlord in such situation where the tenant refuses permission to the landlord to raise additional structure in the tenanted portion. One is that sensing that the tenant is refusing permission to the landlord to raise additional structure he has certainly to move an application u/s. 13(A) of the Rent Act and there is no exception carved out in this section from which the landlord is exempted from moving such an application.

10. The second situation may be that the tenant apprehending that the landlord will encroach upon the tenanted portion may file a suit for declaration and permanent injunction in the competent Court for protecting his tenancy rights in respect of whole or portion of the tenanted accommodation. In that event the landlord has right to defend the suit by raising plea that the portion over which the additional structure is proposed to be made is not part and parcel of tenanted accommodation. In that case the Court may be called upon to decide before granting declaration and injunction as to what is the extent of tenanted accommodation and if it finds that the entire disputed portion forms part of the tenanted accommodation then the declaration and injunction can be granted. If, however, the Court finds that the disputed portion does not strictly form part of the tenanted accomodation, but it is essential for the beneficial enjoyment of the tenanted accommodation then certainly relief can be granted to the tenant making provision that some portion of the disputed land may be used by the tenant for beneficial enjoyment of the tenanted accommodation and the landlord may be restrained from causing interference with tenant's right to use such portion of the tenanted accommodation.

11. The case relied upon by Shri Dagli is practically on identical facts which are involved before me. Here the tenant had filed Suit for permanent injunction restraining the landlord from constructing additional structure on the premises in question. It was held by this Court that it is not necessary for the landlord to file or institute seperate proceedings u/s.13(A) of the Rent Act against the tenant. What is meant by this observation of this Court is that if a tenant files suit for injunction against the landlord then seperate initiation of seperate proceeding u/s.13(A) is not necessary to be initiated by the landlord. It has never been the intention of this Court in this case that in

other cases no application u/s.13(A) of the Rent Act is to be moved by the landlord. This Court proceeded to observe that in the pending Suit it is open to the Court to adjudicate upon the substance of the matter and to find out whether the injunction should be granted or should not be granted or should be granted subject to conditions. Substance of the matter lies in the Court deciding whether undue hardship will be caused to the tenant within the meaning of expression used in Section 13(A) of the Act. It was further held that once the court comes to the conclusion either in an application made u/s.13(A) or in the Suit filed by the tenant that no undue hardship will be caused to the tenant, it is open to the Court to make appropriate order which does not come in the way of the landlord constructing additional structure.

12. Thus, from what has been extracted from the above judgment of this Court it is obvious that this Court has never laid down that no application in writing is required to be moved by the landlord u/s.13(A) of the Rent Act. On the other hand both the possibilities were considered by this Court in its earlier judgment that if the Court comes to the conclusion either on an application u/s.13(A) or in a Suit filed by the tenant that no undue hardship will be caused to the tenant permission can be granted to the landlord. In the case before me it was a Suit filed by the tenant against the landlord claiming declaration and injunction. Consequently in such Suit, in view of the above verdict of this Court, the Courts below were justified to consider whether undue hardship will be caused to the petitioner or not and if this was considered by the lower Court without issue on this point it cannot be said that the judgment of the lower Appellate Court stands vitiated.

13. The other case of Thakker Popatlal Jadavji v/s. Thakker Durlabhji Dharamshi, reported in 1975 GLR 888 is on a different point which has been relied upon by Shri Dagli. Here the expression "undue hardship" was considered with reference to Section 13(A) of the Act and it was held that it is not open to the tenant to contend that he has absolute right to the possession of the terrace forming part of his premises and has no obligation u/s.13(A) to allow or permit his landlord to construct additional structure on the terrace of the building let out to him.

14. In view of the above discussions it is held that if no Suit for injunction is filed by the tenant against

the landlord and the landlord proposes to raise additional structure in the demised premises he has to move an application u/s.13(A) of the Rent Act. However, if the tenant files Suit for injunction against the landlord, in such Suit the landlord can defeat the claim of the tenant by raising his defence and in such suit the Court will be justified to consider the provisions of Section 13(A) of the Act and it is not necessary that in the said Suit specific plea u/s.13(A) of the Rent Act should have been taken or a specific issue should have been framed by the Courts below.

15. The next point for consideration in this Revision is what is the actual extent of the tenanted accommodation. There is findings of the lower Appellate Court based upon proper appreciation of evidence on record and consent decree in the regular Civil Suit No.590 of 1962 that godown on the ground floor, shop on the ground floor and two rooms with terrace on the first floor constituted rented premises. Even in the rent note Ex.58 in respect of residential portion reference is made to two rooms and terrace. Ex.59 is the rent note for the shop. In these two rent notes there is no mention of Deli, namely, the open land, to have been actually let out to the revisionist. Consequently the deli was not included in the tenanted accommodation. The Lower Appellate Court has however considering the definition of premises as cotained in Section 5(8)(b)(i) of the Act found that the land appurtenant to the tenanted building shall be included in the premises. However, this finding of the lower Appellate Court does not mean that the deli was also actually included in the tenanted portion. Further discussion in the judgment of the Lower Appellate Court indicates that the open land in the deli was used for the beneficial enjoyment of the tenanted accommodation by the tenant inasmuch as he used to carry hand cart, luggage and goods in the godown and he also used to carry customers from the Deli for business purposes. This was nothing but acts of beneficial enjoyment for the tenanted accommodation. The tenanted accommodation was let out for residential as well as for commercial purposes. As such it can be said that the Deli was not strictly tenanted accommodation but it was an open land meant for beneficial enjoyment of the tenanted accommodation.

16. If this was the situation regarding user of deli the two courts below were justified, keeping in view the fact and circumstances of the case, that the tenant could usefully enjoy the tenanted accommodation by using only a portion of deli covering 5 ft. in width and not 11 or 16

ft. wide deli. In observing so the two Courts below cannot be said to have acted arbitrarily nor it can be said that they have recorded perverse findings. The Lower Appellate Court has properly considered the question of undue hardship also. It has rightly observed that if total user or Deli by the tenant is prohibited he is bound to suffer some hardship but it would not amount undue hardship to the tenant inasmuch as the tenant has been using deli only for the purpose of egress and ingress and for that purpose 5 ft. wide strip of land was enough for bringing customers and also for bringing hand-carts. From the evidence on record the lower Appellate Court found that the tenant used to bring goods only, on handcarts to his godown. It also took judicial notice that the handcarts are between 3 to 4 ft. wide and as such 5 ft. wide land is sufficient for the beneficial enjoyment of the tenanted portion.

17. In this view of the matter in the Suit for injunction and declaration, the two Courts below were justified in declaring that 5 ft. open land in deli was necessary for benefitial enjoyment of the tenanted accommodation and if such declaration was granted and injunction was granted in respect of such land against the landlord it cannot be said that the Judgment suffers from any illegality.

18. I, therefore, do not find any merit in this Revision which is hereby dismissed with no order as to costs.

sd/-

Date : September 01, 2000 (D. C. Srivastava, J.)

sas